UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ZAKUNDE-ZE HANDBERRY, et al., Plaintiffs, - against - WILLIAM C. THOMPSON, JR., et al., Defendants.	96 Civ. 6161 (GBD) (JCF) ORDER APPOINTING SPECIAL MASTER

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ELECTRONICALLY FILED
DOC #: ______
DATE FILED: 6/10/14

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Preamble

1. This case concerns the provision of educational services, and particularly special education services, to inmates between the ages of 16 and 21 who are in the custody of the New York City Department of Correction (the "DOC"). The action was filed in 1996, and in 2002, the Honorable Constance Baker Motley, U.S.D.J., issued a comprehensive injunction mandating a wide range of services and establishing procedures for the provision of those services (the "Injunction"). Handberry v. Thompson, 219 F. Supp. 2d 525 (S.D.N.Y. 2002). On appeal, the Second Circuit Court of Appeals affirmed the Injunction in part, vacated it in part, and remanded it in part. Handberry v. Thompson, 446 F.3d 335 (2d Cir. 2006). Thereafter, the plaintiffs moved to modify the Injunction, and the City of New York and its officials (collectively, the "City defendants") opposed the motion. The City defendants contend,

among other things, that in the time since the issuance of the Injunction, their policies and practices have changed such that the relief originally ordered is no longer warranted, even to the extent that it would be consistent with the Second Circuit's mandate. Certainly, the record on which the Injunction was based is now stale. Accordingly, it will promote the just, speedy, and efficient resolution of both the pending motion and the litigation as a whole to update the record. In order to assist in that process, it is appropriate to appoint a Special Master to collect information and report to the Court with respect to the current status of provision of educational services at DOC facilities. The expertise of the Special Master will provide for a more efficient and reliable fact-finding process.

Authority

2. The Special Master in this case is appointed pursuant to Rule 53(a)(1)(C) of the Federal Rules of Civil Procedure and the Court's inherent authority. See Scott v. Spanjer Brothers, Inc., 298 F.2d 928, 930 (2d Cir. 1962); SV Special Situations Master Fund, Ltd. v. Knight Libertas, LLC, No. 3:08cv1769, 2011 WL 2680832, at *10 (D. Conn. July 8, 2011); United States V. Vulcan Society, Inc., No. 07 CV 2067, 2010 WL 2160057, at *4 (E.D.N.Y. May 26, 2010).

Selection of Special Master

3. The Court appoints Peter E. Leone, Ph.D., as Special Master. Dr. Leone was recommended jointly by the plaintiffs and the City defendants.

4. Dr. Leone is well-qualified, by both education and experience, to serve in the role to which he is appointed. Significantly, he has expertise both in special education and in education of incarcerated juveniles.

5. Dr. Leone is not disqualified by virtue of any conflict. The parties are aware that Dr. Leone previously served as an expert on behalf of the City defendants in this litigation and that he is currently serving as a consultant to the New York City Administration for Children's Services, and they waive any conflict. In addition, Dr. Leone has provided the attached affidavit pursuant to Rule 53(b)(3)(A).

Scope of Responsibilities

6. The Special Master's role shall be to collect and evaluate facts relating to the provision of educational services to DOC inmates between the ages of 16 and 21 insofar as those facts will assist the Court in modifying the Injunction in accord with the mandate of the Second Circuit. Certain provisions of the Injunction have been vacated outright and are therefore beyond the scope of the Special Master's responsibilities. Other provisions

were affirmed and are subject to the Special Master's review. Finally, some provisions were vacated and remanded for a determination whether they are supported by federal law. This is a mixed question of law and fact, which makes facts related to those provisions appropriate for the Special Master's review. Indeed, in the event that he finds facts that would militate against the renewal of such a provision, it may be unnecessary to determine whether that provision has a basis in federal law. Accordingly, the Special Master shall report on the following issues, with particular reference to the paragraphs of the Injunction that address them:

a. Child find and identification of disabled students: how students with disabilities under the age of 21 are made aware of their right to receive educational services; how those students are identified; and how their Individualized Education Plans ("IEPs") are obtained.

i. Paragraph 19 (screening procedures to identify and evaluate eligible inmates with disabilities).

ii. Paragraph 20 (checking computer system identifying students with IEPs).

iii. Paragraph 22 (procedures for identification of newly-identified eligible students).

iv. Paragraph 23 (requesting and obtaining IEPs).

v. Paragraph 28 (provision of triennials and annuals).

b. The development of IEPs/Special Education Plans ("SEPs"): the procedures by which IEPs are implemented pending development of the SEP; the procedures for developing the SEP and the ways in which it differs from the student's IEP.

i. Paragraph 24 (implementation of existing IEP's as Temporary Education Plans ("TEPs").

ii. Paragraph 25 (limitations on modification of existing IEP).

iii. Paragraph 26 (adherence to out-of-date IEP pending development of SEP).

iv. Paragraph 27 (requirement that IEP/TEP contains assessment of student's performance and impact of disability on curriculum).

v. Paragraph 29 (diagnostic academic testing for students with SEP).

c. Implementation of IEPs and SEPs: whether students are receiving appropriate education as mandated by federal statute and effected by an IEP or SEP, including disabled students confined in restricted housing.

i. Paragraph 24 (implementation of IEP as modified to TEP).

ii. Paragraph 26 (adherence to out-of-date IEP as feasible until SEP is developed).

iii. Paragraph 30 (provision of extended year services if mandated by IEP or SEP).

iv. Paragraph 32 (range of special education services provided).

v. Paragraph 33 (range of related services provided).

vi. Paragraph 35 (adherence to class size restrictions in IEP or SEP).

vii. Paragraph 36 (instruction by certified special education teachers).

viii. Paragraph 37 (provision of transition services).

ix. Paragraph 38 (access to high school programs following release).

x. Paragraph 44 (continued provision of special education even if placed in restrictive education; least restrictive modifications to IEP or TEP consistent with security needs).

d. Whether educational services are provided to all age-eligible inmates at least three hours per school day (paragraph 8).

Timetable

7. The Special Master shall proceed with all reasonable diligence. In view of the fact that he will not be able to observe routine instruction until the school year resumes in the fall of 2014, he shall provide his report by October 31, 2014, subject to reasonable extension upon his request.

8. Within 21 days of the date that the Special Master files his report, each party may submit any objections or comments.

Records

9. The Special Master shall maintain records of all sources of information that he considers, including documents reviewed and persons interviewed.

10. The Special Master shall maintain records of all time spent on the assignment, identifying tasks performed in quarter hour increments. He shall also maintain records, including receipts, for costs and expenses incurred.

Delegation of Responsibilities

11. The Special Master may utilize graduate students or associates under his supervision to perform aspects of the assignment.

12. The time and expenses of graduate students or associates shall not be compensated.

Communications

13. In order to fulfill his assignment, the Special Master may have communications with persons from whom he is soliciting information without notifying counsel for the parties or the Court.

14. The Special Master may have ex parte communications with the Court in order to facilitate completion of his assignment and to provide information to the Court.

15. Any communications by the Special Master with counsel shall include counsel for both the plaintiffs and the City defendants except insofar as such communications are merely for such purposes as scheduling an observation. Any written communications with counsel shall be copied to all counsel.

16. The Court shall provide the Special Master with relevant documents from the court record.

17. The Special Master may request documents from the Court or from the parties.

Compensation

18. The Special Master shall be compensated at the rate of $175.00 per hour.

19. The Special Master shall be reimbursed for reasonable costs and expenses, including transportation and accommodations while attending court proceedings or conducting observations in New York City.

20. The Special Master shall submit an invoice for services, supported by time records and receipts, every two months.

21. The City Defendants shall be responsible for the Special Master's compensation and expenses. These defendants were previously responsible for compensating the court-appointed monitor in this case, and they are the parties now contending that it is necessary to supplement the record in connection with modifying the Injunction. Further, they are better able than the plaintiffs to bear the expense of the Special Master.

SO ORDERED.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
June 10, 2014

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Now comes the affiant, Peter E. Leone, a citizen of the United States, over the age of 21 years, and declares under penalty of perjury:

1. I am a Professor in the College of Education at the University of Maryland, College Park, Maryland, 20742.
2. I have disclosed potential conflicts of interest with attorneys for plaintiffs and defendants in the captioned matter including my membership on a task force chaired by the Commissioner for the Administration for Children's Services of NY City. I understand that they have waived any conflict related to those issues. I confirm that I am in compliance with Federal Rule of Civil Procedures 53(b)(3)(A) that I have no conflict of interest and no reason for disqualification as a Master under 28 U.S.C. §455.

At Rockville, Maryland
June 6, 2014

Peter E. Leone

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